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Supreme Court of the United States

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OXFORD HOUSE-C., an unincorporated association; OXFORD HOUSE, INC., a Delaware not-for-profit corporation; OXFORD HOUSE-W., an unincorporated association; MISSOURI DEPARTMENT OF MENTAL HEALTH, DIVISION OF ALCOHOL & DRUG ABUSE,

Petitioners,

vs.

CITY OF ST. LOUIS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals misapprehended and misapplied the clearly erroneous standard?

PARTIES TO THE PROCEEDING

Oxford House-C.

Oxford House, Inc.

Oxford House-W.

Missouri Department of Mental Health, Division of Alcohol & Drug Abuse

City of St. Louis

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PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 23, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 77 F.3d 249 (8th Cir. 1996) and is reprinted in the Appendix hereto at pp. A-1—A-8.

The opinion of the United States District Court for the Eastern District of Missouri is reported at 843 F.Supp. 1556 (E.D. Mo. 1994) and is reprinted in the Appendix hereto at p. A-11—A-60.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 23, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES, RULES, AND ORDINANCES INVOLVED

Relevant portions of the Fair Housing Act as amended, 42 U.S.C. §§3601 *et seq.*; Section 504 of the Rehabilitation Act, 29 U.S.C. §794; Rule 52(a) of the Federal Rules of Civil Procedure; and relevant portions of zoning ordinances of the City of St. Louis are set forth in the Appendix hereto, beginning at p. A-61.

STATEMENT OF THE CASE

On November 26, 1991, petitioners Oxford House-C. and Oxford House, Inc. commenced this action in the United States District Court for the Eastern District of Missouri. Petitioners complained that defendant City of St. Louis had undertaken enforcement efforts against Oxford House-C. because of the handicap of its residents, in violation of the Fair Housing Act, 42 U.S.C. §§3601 *et seq.*; the Rehabilitation Act, 29 U.S.C. §794;

and other federal statutory and constitutional provisions. Jurisdiction in the district court was based on 28 U.S.C. §§1331, 1343(3) and (4), and 42 U.S.C. §3613.

Shortly after the action was filed, the Missouri Department of Mental Health, Division of Alcohol and Drug Abuse obtained leave to intervene as a party plaintiff. In Missouri, the Department of Mental Health provides staff to assist in the location, start-up, and ongoing operation of individual Oxford Houses across the state. Petitioner Oxford House-W. was also added as a plaintiff after the City cited it as an illegal boardinghouse in June of 1992. When the City challenged the constitutionality of the Fair Housing Act, the United States of America was granted leave to intervene pursuant to 28 U.S.C. §2403 and Fed.R.Civ.P. 24(a).

A. Oxford House and the City of St. Louis

Petitioner Oxford House-C. is a group home for ten recovering alcoholics and addicts which opened in a single-family neighborhood of the city of St. Louis, Missouri in March, 1991. The property leased by Oxford House-C. was owned by the Franciscan Sisters of Mary, a religious order that had formerly used the property as a residence for as many as five nuns. After Oxford House-C. opened, the neighborhood association called a meeting about the House where neighbors voiced concerns about rapists, the safety of neighborhood children, and the residents' criminal records. On the day of the neighborhood meeting, a complaint was made to the City about an "illegal halfway house" operating at the Oxford House-C. property. The neighborhood association also notified the alderman of the concerns raised at the meeting, and he advised the Zoning Administrator and other city officials of his constituents' opposition to the Oxford House.

Thereafter, city inspectors repeatedly came to inspect the House. Inspector supervisor Walter Murphy indicated to the

Franciscan Sisters that because of the neighbors' complaints, he had to find something wrong with the House. He said that the neighbors did not have specific complaints, but were concerned that a "drug rehab house" was in their neighborhood. He also told the Sisters that the neighbors were concerned because the House had a "multiracial population." Murphy then consulted the City's chief zoning official, the Zoning Administrator, about what they "could use" against the House. The Zoning Administrator subsequently testified that he would not want a group home for recovering alcoholics and addicts living next door to him because of their impact on children's safety, property values, and transiency. He instructed Murphy to cite the House for violating the City's zoning use restriction against more than three unrelated people living together in single-family districts.

On July 18, 1991, the City of St. Louis issued a violation letter to the Franciscan Sisters as the record owner of the Oxford House-C. property. The notice alleged that the property was in violation of the three-unrelated-person zoning rule. The citation letter also listed two building code violations involving basement bedroom window space and ceiling height. The City subsequently filed a municipal court information against the Sisters based on the same three zoning and building code violations.[1]

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[1]The Eighth Circuit in this case held that "the City cited the houses for violating the eight-person limit." Appendix hereto ("App.") A-2. However, the district court found that the violation notice regarding Oxford House-C. cited the House for violating the three-person limit. App. A-22, A-46. *See* also Transcript ("Tr.") III, 103; Appellant's Appendix ("Def. App.") 160-161. Furthermore, the parties stipulated and the district court found that the municipal information filed against the Sisters regarding the Oxford House-C. property similarly alleged violation of the three-person limit. App. A-22; Def. App. 73-74, 77. *See* also Appellees' Appendix ("Pltf. App.") 115-116.

In April 1992, after this litigation had begun and long after the violation notice and information on Oxford House-C. had been issued, the City

(Footnote 1 continued on next page)

Missouri Department of Mental Health (DMH) staff opened Oxford House-W. on May 1, 1992 for twelve recovering alcoholics and addicts. It was located in a six-bedroom home in another single-family neighborhood in the city. On the day it opened and before any residents other than the DMH staff-member had moved in, neighbors confronted the DMH official and later that evening gathered across the street, pointing and gesturing at the House. Intimidated, the DMH staff-member left by the back door. On that same opening day, neighbors and the neighborhood association president contacted the alderman—the same alderman representing the Oxford House-C. neighborhood. The next day, at a neighborhood social event, neighbors again voiced their fears about Oxford House-W. to the alderman—fears about the safety of neighborhood women and children, transiency, and diminished property values. The alderman notified the city counselor's office which in turn made arrangements with petitioner's counsel to add Oxford House-W. to this action. Oxford House-W. was inspected, and the city cited it for operating as an illegal boardinghouse.

B. Decisions Below

After an eight-day bench trial, the district court entered judgment for petitioners on their Fair Housing and Rehabilitation Act claims.[2] In a fifty-page Memorandum Opinion, the

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(Footnote 1 continued)

amended its zoning code to allow group homes for eight or fewer handicapped persons and two additional people acting as houseparents or guardians as uses by right in single-family districts. App. A-27. Although the eight-plus-two rule was in effect when Oxford House-W. was cited, the violation alleged against it was that the property was being used as an illegal rooming/boarding house or hotel. *See* Pltf. App. 186-187.

[2]The district court declined to reach plaintiffs' constitutional claim. App. A-58—A-59. It further found that plaintiffs did not have a private right of

(Footnote 2 continued on next page)

district court found that in its zoning enforcement activities, the City had intentionally discriminated against the Oxford Houses because of their residents' handicap. The ultimate finding of intentional discrimination was based on a number of subsidiary findings, most notably that city officials had undertaken the enforcement efforts because of their own unfounded, stereotypical fears of recovering alcoholics and addicts and because of the neighborhoods' fears about the disability of Oxford House residents.[3]

The district court also found that the City had failed to make reasonable accommodation in its zoning rules and practices by refusing the Oxford Houses' request for non-enforcement of the single-family use restrictions. In reaching that determination, the trial court found that, in light of neighborhood and aldermanic opposition to the Oxford Houses, it would have been futile to seek accommodation through the City's variance process.[4] Petitioners also challenged the City's building code enforcement efforts, but the district court found that, with respect to those activities, they had failed to show either intentional discrimination or failure to make reasonable accommodation.[5]

In an eight-page opinion, the court of appeals reversed as "clearly erroneous" the trial court's finding that the City had enforced its zoning restriction against the Oxford Houses because the residents were recovering addicts and alcoholics.[6] The court of appeals also concluded that the district court had "committed clear error" in finding that it would have been futile for the Oxford Houses to seek accommodation through the City's variance process.[7]

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[3]App. A-20—A-25; A-41—A-45.

[4]App. A-29—A-30; A-54—A-55.

[5]App. A-56.

[6]App. A-5—A-6.

[7]App. A-7.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Review the Eighth Circuit's Understanding and Application of the "Clearly Erroneous" Standard

The court of appeals' decision in this case is an object lesson in the problems that arise when an appellate court ignores the limited scope of review established by Rule 52 of the Federal Rules of Civil Procedure. In addition to misapprehending the ordinance sought to be enforced against Oxford House, the appellate court below ignored the original version of critical testimony relied on by the district court, ignored the trial court's vantage point for assessing the credibility of witnesses, and, having done so, concluded that the lower court's finding of intentional discrimination and its finding of futility in the City's variance process were both clearly erroneous.

The court of appeals in the instant case did not articulate the standard of review mandated by Rule 52(a), did not discuss its obligations under that standard, nor did it properly apply the standard. More than a decade ago, in 1985, this Court emphasized that the clearly erroneous standard of review is a deferential one. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985). The decision of the reviewing court in this case suggests that it may be time to re-emphasize that deference to the trier of fact is still the rule and not the exception. *Id.* at 575.

A. The Trial Court's Finding of Intentional Discrimination

A finding of intentional discrimination is a finding of fact subject to the clearly erroneous standard of Rule 52. *See Anderson v. Bessemer City*, 470 U.S. at 573; *Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982). "'Findings as to the design, motive and intent with which men act' . . . [are] peculiarly factual issues for the trier of fact and therefore subject to appellate review under Rule 52." *Pullman-Standard*, 456 U.S. at 288,

quoting *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

The district court in this case found that the City had intentionally undertaken zoning enforcement efforts against the Oxford Houses because of their residents' disability.[8] It based that determination on subsidiary findings that city officials had undertaken those actions because of their own unfounded, stereotypical fears of recovering alcoholics and addicts and because of the neighborhoods' fears about the disability of Oxford House residents.[9] It found further evidence of the City's discriminatory purpose in the zoning amendments adopted during this litigation.[10] The court of appeals, however, held that the trial court "committed clear error" in finding intentional discrimination.[11]

1. Discriminatory Motivation

a. City Officials' Animus

The trial court's finding of intentional discrimination rested in part on direct evidence that the Zoning Administrator was biased against plaintiffs because of their disability. The Zoning Administrator testified that he would not want recovering alcoholics and addicts living next door to him.[12] The court of appeals dismissed this evidence as "isolated comments."[13] However, the

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[8]App. A-41—A-45.

[9]App. A-42—A-43.

[10]App. A-43.

[11]App. A-6.

[12]App. A-23, A-42.

[13]App. A-6. In rejecting this evidence of the City's discriminatory motivation, the court of appeals also noted that "the Oxford Houses were plainly in violation of a valid zoning rule and City officials have a duty to ensure compliance." *Id.* Petitioners do not concede that either the three-person or the eight-plus-two rule was valid, but even if it were, a valid rule will

(Footnote 13 continued on next page)

Zoning Administrator was the City's chief zoning official and, as the district court found, the city official who made the actual decision to cite Oxford House-C. for violating the zoning code.[14] Furthermore, the statement by the Zoning Administrator was made as testimony in this matter, both in his deposition and at trial. Similar testimony has been considered as properly probative of discriminatory intent. *Anderson v. Bessemer City*, 470 U.S. at 569, 579 (reversing clearly erroneous determination where trial court's finding of bias was based in part on decisionmaker's "testimony . . . that he would not want his wife to perform" the duties of the job in question).

The court of appeals also implied that the Zoning Administrator's testimony had been elicited by a "have you stopped beating your wife" question.[15] With its superior knowledge of the pretrial proceedings in the case, the trial court was aware that the Zoning Administrator had in fact volunteered his bias during deposition:

(Footnote 13 continued)

not immunize discriminatorily motivated conduct. *See LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2nd Cir. 1995); *United States v. Borough of Audubon, N.J.*, 797 F. Supp. 353, 360 (D. N.J. 1991), *aff'd without opinion*, 968 F.2d 14 (3d Cir. 1992); *United States v. City of Parma, Ohio*, 494 F. Supp. 1049, 1099 (N.D. Ohio 1980), *aff'd*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). The Fair Housing Act provides as much. *See* 42 U.S.C. §3615 ("any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under [the Act] shall to that extent be invalid").

[14]App. A-23. The City zoning code defines the zoning administrator as "[t]he position responsible for administering and enforcing the Zoning Code." App. A-70, A-76 (§26.08.480 of Ordinances 59979, 62588).

[15]App. A-6 ("when Oxford House's counsel asked the City's Zoning Administrator whether he would want to live next door to an Oxford House, the Zoning Administrator said no and expressed concern about transiency and property values").

Q. Mr. Dobbs, does it impose any burden on the City to have ten recovering addicts and alcoholics living in a single family dwelling at 6957 Clayton?

A. That I can't answer.

Q. You don't know whether it imposes—?

A. No. I wouldn't want them living next door to me, I don't know about you.[16]

The district court found further evidence of bias in the "common, stereotypical fears" about group homes for people with disabilities which the Zoning Administrator offered to explain his testimony—fears about the safety of small children, diminished property values, and transiency.[17]

The district court also relied on direct evidence of discriminatory animus on the part of another key city official. There was testimony at trial that William Kuehling, while serving as special assistant to the mayor, had stated that the Oxford Houses would cause flight from the city.[18] The Eighth Circuit also characterized this evidence as "isolated comments."[19] Kuehling's statement, however, was made to Missouri Department of Mental Health officials in response to their specific request for assistance with locating Oxford Houses in the city.[20] Furthermore, the evidence showed that at the time the City commenced its enforcement efforts against Oxford House-C., Kuehling was the

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[16]Pltf. App. 224. *See also* App. A-23. The district court had specific knowledge of the Zoning Administrator's statement because his deposition testimony was the subject of a motion to compel directed at his refusal, on advice of counsel, to answer why he would not want to live next door to a group recovery home.

[17]App. A-23.

[18]App. A-18, A-42.

[19]App. A-6.

[20]App. A-18.

head of the city department which included both the Zoning Administrator and the building inspection division.[21]

b. City Deference to Discriminatory Animus in the Community

The trial court also found that the City had undertaken enforcement efforts against the Oxford Houses in response to the neighborhoods' unfounded fears about the disability of Oxford House residents.[22] The court of appeals acknowledged evidence showing that the inspectors were aware of community opposition to the Houses and hoped to find them in violation of the zoning code. According to inspector supervisor Murphy, the neighbors had "concern for the idea that a drug rehab house was in their neighborhood" rather than complaints about any specific problems presented by Oxford House-C.[23] Murphy also felt that the neighbors were concerned because Oxford House-C. had a "multiracial population."[24] He indicated to the secretary for the Franciscan Sisters that he needed to find something wrong with the House because of the neighborhood complaints, and he asked the Zoning Administrator if violation of the single-family use restriction would be "heading in a right direction . . . , if that's what we could use" against the House.[25]

The court of appeals dismissed this evidence because, it said, the inspectors did not hold policymaking positions.[26] However, the City, in its answers to interrogatories, identified inspectors

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[21]App. A-12. *See* also Tr. IV, 7-8.

[22]*See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 449 (1985) (City may not defer to the wishes or objections of some fraction of the body politic); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

[23]App. A-23.

[24]App. A-23.

[25]Def. App. 273; App. A-23.

[26]App. A-6.

Murphy and Wente as decisionmakers with regard to inspecting Oxford House-C., issuing the notice of violation against the House, and filing the information against it.[27] Furthermore, inspector supervisor Murphy informed the Zoning Administrator—who, according to the district court, made the decision to cite Oxford House-C. for the zoning violation—of the neighborhood complaints.[28] The Zoning Administrator also learned about the community opposition from the alderman.[29] The alderman had received reports on the neighborhood meeting about Oxford House-C. where concerns were expressed about "increased crime, whether convicted rapists lived in [the House], and whether children would continue to be safe in the neighborhood," and he heard similar fears voiced by other neighbors of the House.[30]

The court of appeals also insisted that the inspectors' conduct and remarks were taken out of context.[31] There was, however, no dispute about what actions the inspectors took, only about why they took them. As to the inspector's statements, the trial court was able to judge the credibility of the inspector supervisor and

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[27]Pltf. App. 73-75.

[28]Tr. III, 193-194.

[29]Tr. IV, 102-103.

[30]App. A-20.

[31]The district court found that similar discriminatory animus on the part of neighbors prompted the City to pursue Oxford House-W. App. A-43. The evidence showed that on the day that the House opened and before any residents other than a Department of Mental Health staff-member had moved in, neighbors expressed concerns about the House to their alderman (the same alderman who represented the Oxford House-C. neighborhood). Their concerns reflected the same stereotypical fears about property values, transiency, and the safety of neighborhood women and children. On that very same day, the alderman notified the city counselor's office, and arrangements were made to add Oxford House-W. to this litigation. The district court found that if it had not been so joined, the City would have proceeded with enforcement actions against it. App. A-23-26.

the Franciscan sister who testified about her conversations with the inspector supervisor. The sister's testimony was supported by her notes about those conversations.[32] In reality, the Eighth Circuit simply disagreed with the district court's conclusion that this evidence showed city officials had acted in response to community bias against the protected group. But the district court's account of the evidence and the inferences it drew from that evidence are more than "plausible in light of the record viewed in its entirety," and therefore "the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. at 573-574.

c. Zoning Changes Also Evidence the City's Discriminatory Animus

The district court also based its finding of intentional discrimination on the zoning amendments enacted by the City in the midst of this litigation. Although the trial court saw these changes as further evidence of the City's discriminatory animus, the court of appeals did not address this basis of the intentional discrimination finding.[33] This Court, however, has recognized that the timing, substantive consistency, and legislative history of zoning changes may shed light on a municipality's discriminatory purpose. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-268 (1977).

The district court considered those very aspects of the City's zoning amendments. In April 1992, some four months after this litigation had begun, the City modified its zoning code to permit group homes for eight or fewer handicapped residents and two houseparents or guardians as uses by right in single-family districts. As the trial court noted, this amendment belatedly

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[32]Def. App. 274.

[33]App. A-43.

brought the City thus into compliance with the minimum requirements of state law—requirements which had been on the books since 1985. While the City thus made certain that it was in compliance with state law by the time of trial, it did so in a way that still precluded Oxford House-C. from remaining in its single-family district.[34]

To the district court, the substantive inconsistency in the City's zoning treatment of Oxford House further evidenced its discriminatory purpose.[35] In the zoning amendments adopted in April 1992, the City allowed other uses in its single-family neighborhoods which increased congestion, traffic, noise, transiency, and population density. The new amendments allowed bed and breakfast tourist homes with up to seven guestrooms (defined as a room for no more than four persons) as conditional uses in single-family districts.[36] Those same tourist homes could be uses by right in any zoning district, including single-family districts, where a "bed and breakfast district" was designated.[37] The new amendments also allowed two baby-sitting centers per block as uses by right in single-family districts.[38]

At the same time, the City construed its eight-plus-two amendment as a cap on the number of people with disabilities who live in group homes in single-family neighborhoods.[39] Despite the fact that the new rule allowed a total of ten people to reside in a group home as a matter of right, the City would not permit Oxford House-C. to have ten handicapped residents instead of eight plus two houseparents or guardians. Furthermore, the City

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[34]App. A-43.

[35]App. A-52.

[36]App. A-27, A-75, A-76, A-78 (§§26.08.053, 26.08.230, 26.20.025.1 of Ordinance 62588).

[37]App. A-27, A-79 (§3(B) of Ordinance 62589).

[38]App. A-27, A-77 (§26.20.020.8 of Ordinance 62588).

[39]Tr. III, 215.

did not amend the conditional uses allowed in single-family districts to allow group homes with more than eight handicapped residents.[40] Similar inconsistencies in the zoning treatment of a group home for people with disabilities were fatal in *City of Cleburne*. *See* 473 U.S. at 447-448.

The district court also heard testimony from the alderman who sponsored the new zoning amendments. It was the alderman for the ward in which Oxford House-C. (and subsequently, Oxford House-W.) was located. He admitted knowing of his constituents' fears about the group recovery home, and those fears reflected discriminatory animus toward recovering alcoholics and addicts.[41] He offered no coherent explanation for the substantive inconsistencies in the City's treatment of Oxford House, thus confirming the district court's inference of discriminatory purpose.[42]

There was more than sufficient evidence in the record to support the trial court's finding that animus against the protected group motivated both the City decisionmakers themselves and those to whom they were knowingly responsive.

2. Differential Treatment

a. Explicit Facial Discrimination

The court of appeals also rejected the trial court's finding of intentional discrimination because "Oxford House did not show the City treated the Oxford Houses differently from any other group."[43] However, the new zoning amendment adopted by the City explicitly classifies on the basis of handicap and thereby

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[40]App. A-27, A-78 (§26.20.025 of Ordinance 62588).

[41]App. A-20.

[42]App. A-25, A-27.

[43]App. A-5.

treats the Oxford Houses and other group homes for people with disabilities differently from any other group. Just as it did not address the district court's reliance on the zoning amendment as additional evidence of discriminatory motivation, the court of appeals also failed to assess the new amendment using the traditional framework for analyzing disparate treatment through explicit facial discrimination.

That analysis focuses on the explicit terms of the policy, not on the motives of the policymakers. *International Union, UAW v. Johnson Controls, Inc.*, __U.S.__, 111 S.Ct. 1196, 1203 (1991) ("Whether an employment practice involves explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"). Thus, a policy or practice is facially discriminatory when it expressly classifies on the basis of protected status, and it will constitute discrimination *vel non* unless defendant proves that the policy or practice is justified under a statutory affirmative defense. *See id.* at 1204; *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-122 (1985). This framework has been used to analyze policies which expressly classify on the basis of gender and age. *Johnson Controls*, 111 S.Ct. at 1203-1204; *Thurston*, 469 U.S. at 121. The Tenth Circuit has also applied the framework under the Fair Housing Act to a municipal ordinance facially discriminating on the basis of handicap. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501-1503 (10th Cir. 1995). *See also Horizon House v. Township of Upper Southampton*, 804 F.Supp. 683, 693-694 (E.D. Pa. 1992), *aff'd without opinion*, 995 F.2d 217 (3d Cir. 1993).

On its face, the City's zoning code treats people with disabilities differently from nonhandicapped people. While it caps at eight the number of handicapped persons who may live together by right, it allows an unlimited number of nonhandicapped

related people to do so.[44] It also permits bed and breakfast tourist homes with up to twenty-eight nonhandicapped unrelated residents as uses by right in any zoning district where a "bed and breakfast district" has been designated.[45] Even without such a designation, bed and breakfast establishments with up to twenty-eight occupants are allowed as conditional uses in "A" single family, "B" two family, and "C" multiple family districts.[46] Not so with group homes for nine or more handicapped residents; "homes in which nine or more . . . mentally or physically handicapped persons reside" are conditional uses only in "D" multiple family through "H" area commercial districts.[47]

The City zoning scheme thus involves disparate treatment through explicit facial discrimination. In this case, the City did not prove that its facially discriminatory policy was justified under one of the affirmative defenses established by the Fair Housing Act. The only statutory affirmative defense pled by the City was that its numerical household composition rules were reasonable occupancy standards exempt from the Act's requirements pursuant to 42 U.S.C. §3607(b)(1).[48] Relying on *City of Edmonds v. Oxford House, Inc.*, __U.S.__, 115 S.Ct. 1776 (1995), the Eighth Circuit held that the City's use restrictions did

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[44]App. A-70, A-71 (§§26.08.160, 26.20.020.1.A of Ordinance 62588). In the legislative history of the 1988 amendments to the Fair Housing Act, Congress indicated that the Act as amended prohibited the "imposition of . . . land-use requirements on congregate living arrangements among non-related persons with disabilities" when those requirements "are not imposed on *families* and groups of similar size of other unrelated people." H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 24, *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, at 2185 (emphasis added).

[45]App. A-27, A-79 (§3(B) of Ordinance 62589).

[46]App. A-27, A-75, A-76, A-78 (§§26.08.053, 26.08.230, 26.20.025.1 of Ordinance 62588).

[47]App. A-27, A-75 (§26.32.025.7 of Ordinance 62183).

[48]Def. App. 149.

not qualify for the statutory exemption. Since the City's zoning policy overtly discriminates on the basis of handicap and does not fall within a statutory exception, the court of appeals erred in refusing to find the policy in violation of the Fair Housing Act and the Rehabilitation Act.

b. Disparate Treatment of the Oxford Houses

In addition to the disparate treatment apparent on the face of the City's zoning code, there was other evidence that the City treated Oxford House differently from other group living arrangements. To the district court, the clear inference from the evidence was that the City would not have taken enforcement steps against the Oxford Houses if their residents "had been a desirable group of nonhandicapped persons" such as the nuns who had previously lived in the Oxford House-C. property in numbers exceeding the zoning code.[49]

The court of appeals acknowledged petitioners' evidence that various religious orders had more than three unrelated members living together in single-family dwellings across the city.[50] The evidence further showed that no variances or conditional use permits had been granted by the City authorizing those uses, and yet the City had undertaken no enforcement efforts against those group living arrangements.[51] The Eighth Circuit, however, rejected this evidence because, it said, petitioners failed to show that these group living arrangements were not valid pre-existing uses and that the city building inspection office knew of these violations.[52]

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[49]App. A-44.

[50]App. A-5.

[51]Pltf. App. 1-15, 220; Tr. V, 146-151.

[52]App. A-5.

In fact, there was undisputed evidence that these uses were not valid as either pre-existing or accessory uses. Under its nonconforming use provision, the City's zoning code validates only those uses which existed lawfully on May 25, 1950 or on the effective date of the pertinent code amendment.[53] Since the unrelated person rule was part of the 1950 code rather than a later amendment, the use of a single-family dwelling by more than three unrelated people would be valid only if it existed prior to May 25, 1950.[54] In this case, the evidence showed that the various religious orders did not begin to use the buildings in question as dwellings for more than three unrelated members until between 1977 and 1986—well after 1950.[55] In addition, petitioners established that those dwellings were not accessory to other buildings which might have been lawful.[56]

The evidence also showed that the City knew or should have known of the zoning violations by the various religious orders. The alderman for the Oxford Houses knew that a group of nuns lived together in the Oxford House-C. property, but the City never issued any citation regarding that use.[57] Furthermore, the City did not operate an exclusively complaint-driven inspection process. The City building inspection division had an entire section of inspectors devoted to conducting house-to-house inspections for code violations. At least two of the dwellings occupied by unrelated members of the religious orders displayed signs openly and notoriously indicating their use.[58] The City

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[53]App. A-70, A-75 (§26.08.025 of Ordinance 59979, 62588).

[54]The Zoning Administrator testified that the unrelated person rule was part of the City's 1950 zoning code. *See* Dobbs Deposition, May 4, 1992, p. 33, lines 9-16; p. 48, line 25; p. 49, lines 1-25; p. 50, lines 1-21.

[55]Pltf. App. 1-15, 220; Tr. V, 146-151.

[56]Tr. V, 146-151.

[57]Tr. III, 131; IV, 81.

[58]Tr. V, 148, 150.

should have known about and pursued those obvious violations.[59]

The district court's finding of intentional discrimination was amply supported by testimony and other evidence in the record. If the court of appeals had applied the standard of review commanded by Rule 52(a), it should not have set aside that finding by the trial court.

B. The Trial Court's Finding of Futility in the Variance Process

With respect to petitioners' reasonable accommodation claim, the City took the position that a request for a variance was the only valid way for plaintiffs to seek an accommodation in its single-family use restriction. The trial court, however, found that it would have been futile for the Oxford Houses to pursue a variance.[60] In discerning clear error in the district court's finding of futility,[61] the Eighth Circuit improperly conducted a *de novo* weighing of the evidence and failed to give due regard to the ability of the trial court to assess the credibility of witnesses.

The trial court found that a variance application would have been a futile gesture in this instance because of aldermanic and neighborhood opposition to the Oxford Houses and the City's practice of allowing such opposition to have a dispositive effect on variance and conditional use applications.[62] The court of appeals acknowledged that the neighbors and the alderman were opposed to the Oxford Houses.[63] However, with regard to the impact of aldermanic and neighborhood opposition on variance and conditional use decisions, there was conflicting evidence.

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[59]Tr. III, 73-74.

[60]App. A-54—A-55.

[61]App. A-7.

[62]App. A-29, A-54—A-55.

[63]App. A-7.

During his adverse direct examination, the City's Zoning Administrator conceded that if there were "strong neighborhood opposition" to a variance, "chances would be very good that it would be denied."[64] In his deposition, he had identified "neighborhood input" as the basic factor in the approval or denial of variances.[65] The record also included a statement from the Zoning Administrator in connection with another complaint of housing discrimination against individuals with disabilities. In that matter, the Zoning Administrator stated that "seldomly [sic] is an application for a Condition Use Permit or variance granted in the face of opposition from the community and Aldermen."[66]

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[64]Tr. III, 211.

[65]Pltf. App. 228-229.

[66]Tr. III, 165. The parties stipulated that a housing discrimination complaint had been filed against the City following its denial of a conditional use permit for a residential care facility for individuals with mental disabilities. Tr. III, 158-162. In his interview regarding that complaint, the Zoning Administrator also stated as follows:

> Q. Tell me sir, in light of these facts, would it be feasible for the City to reconsider this application?
>
> A. Yes, Mr. Brown, it would be feasible for us to reconsider the application under these code sections, but if you are asking me, would it make a difference upon the ultimate outcome of the City's decision, I would have to say that this is an extremely difficult question to answer. This is so, because of the high level or volume of opposition from neighbors within the community.
>
> Q. Tell me this, would the affirmative requirements of the code, or its mandatory obligations upon an applicant seeking permission to construct a new property to be used as a residential care facility, create a bar to the cities [sic] legally granting the permit?
>
> A. My best guess would be that it,—that is, the code does not. However, let me add that as a practical matter, I don't see the provisions to which you refer having much impact upon the ultimate outcome of this application, especially as long as there is Alderman and neighborhood opposition.

Tr. III, 164.

The conflicting evidence was adduced when the Zoning Administrator and the alderman for the Oxford House neighborhoods were questioned at trial by counsel for the City. Both city officials indicated that there had been occasions when variances were granted despite community or aldermanic opposition.[67]

The trial judge resolved this conflict in the evidence in favor of petitioners. While acknowledging that it was not impossible for a variance to be granted in the face of opposition from the neighborhood or the alderman, the court concluded that "[t]he clear inference from the evidence presented" was that the Oxford Houses "would have obtained only a denial of the requested variance." The district court therefore found that "the variance process would have provided only a futile remedy."[68] Reading the same record, the Eighth Circuit apparently drew a contrary inference and concluded that the district court had "committed clear error" in its finding of futility.[69]

"Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. at 574. Rule 52 demands even greater deference to the trial court's findings when they are based on his or her decision about which testimony to believe. *Id.* at 575. In this case, the district court chose to credit the Zoning Administrators's admissions against interest rather than the testimony elicited by his own counsel. Those admissions were also confirmed by extrinsic evidence in the form of the Zoning Administrator's statement in another housing discrimination matter. *Id.*

Since there was sufficient evidence in the record to support the district court's finding of futility, the court of appeals should not have set it aside.

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[67]Tr. III, 228-229; IV, 138-139.

[68]App. A-55.

[69]App. A-7.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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